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No. 923

# In the Supreme Court of the United States

OCTOBER TERM, 1969

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**JAMES LEE HILGENECK,**

*Petitioner,*

**vs.**

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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KENNETH S. JACOBS
JACOBS & SPENCER
207 South Villa Avenue
Villa Park, Illinois 60181
312-833-1510
*Attorneys for Petitioner*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Under Rule 19(1)(b):

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(1) Under Selective Service Regulation 32 CFR, Section 1660.20(d), must the Local Board authorize and issue a Civilian Work Order, or may the Clerk or one member of the Local Board issue such an Order based upon a so-called "Implied Conditional Order" of the Local Board? ..... 5

That the Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or so far

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(2) Is it a denial of due process of law in violation of the Fifth Amendment to the United States Constitution, for the Trial Judge in a Selective Service case involving a conscientious objector, to excuse for cause a juror with a son serving in Viet Nam and then fail to advise defendant or his counsel until after the trial and finding of guilt, that the Trial Judge also had a son then serving in Viet Nam? ..... 9

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Petitioner, James Lee Hilgeneck, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on November 7, 1969 in the above entitled cause.

### CITATION TO THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, printed in Appendix A hereto, *infra*, page App. 1, is unreported at the present.

## JURISDICTION

The Opinion and Judgment of the Court of Appeals were filed and entered on November 7, 1969. This Petition for Writ of Certiorari will be timely filed on or before December 8, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

(1) Under Selective Service Regulation 32 CFR, Section 1660.20(d), must the Local Board authorize and issue a Civilian Work Order, or may the Clerk or one member of the Local Board issue such an Order based upon a so-called "Implied Conditional Order" of the Local Board?

(2) Is it a denial of due process of law in violation of the Fifth Amendment to the United States Constitution, for the Trial Judge in a Selective Service case involving a conscientious objector, to excuse for cause a juror with a son serving in Viet Nam and then fail to advise defendant or his counsel until after the trial and finding of guilt, that the Trial Judge also had a son then serving in Viet Nam?

(3) Is an Order to Report for Civilian Work in Lieu of Induction, a violation of the Thirteenth Amendment?

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in material part as follows:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; . . ."

The Thirteenth Amendment to the Constitution of the United States provides in material part as follows:

"Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

## REGULATIONS INVOLVED

Selective Service Regulation 32 CFR, Section 1604.59 states in material part as follows:

"Official papers issued by a Local Board may be signed by the Clerk of the Local Board if he is authorized to do so by resolution duly adopted by and entered in the Minutes of the meetings of the Local Board . . . ."

Selective Service Regulation 32 CFR, Section 1660.20(d) states in material part as follows:

"If after the meeting referred to in paragraph (c) of this Section, the Local Board and the Registrant are still unable to agree upon a type of civilian work which should be performed by the Registrant in lieu of induction, the Local Board, with the approval of the Director of Selective Service shall order the Registrant to report for civilian work . . . ."

## STATEMENT OF THE CASE

The Petitioner, James Lee Hilgeneck, was indicted under a charge of violating the Universal Military Training and Service Act, 50 U.S.C.A. Section 462. Specifically he was charged with willfully and knowingly failing to perform a duty required of him under and in the execution of the Universal Military Training and Service Act in that he was charged with failing and neglecting to comply with an Order of his Local Board to report for civilian work. His trial was held before a jury on July 23, 1968, the Honorable Thaddeus M. Machrowicz, District Judge of the Eastern District of Michigan, Southern Division, pre-

siding. On July 25, 1968 a verdict of guilty was returned by the jury. The Trial Judge rendered his Order of Judgment and Order of Commitment to five (5) years imprisonment on September 18, 1968. Mr. Hilgeneck filed timely Notice of Appeal. Upon appeal, the conviction was affirmed by the Court of Appeals for the Sixth Circuit and Mr. Hilgeneck now timely files this Petition for a Writ of Certiorari to the Supreme Court of the United States.

The evidence showed at the trial that no meeting of the Local Board was ever held under the provision of 32 CFR, Section 1660.20(d) where the Local Board met to specifically authorize the issuance of an Order to Report for Civilian Service, and that no authorization was ever given to the Clerk of the Local Board under 32 CFR, Section 1604.59 to sign such an Order. Nevertheless, after the Clerk wrote to the National Director for permission to issue such an Order and received a reply, the Clerk on her own motion and without a meeting of the Local Board, issued the Order to Report for Civilian Work over her personal signature.

In addition, the Record of Proceedings reflects that, inasmuch as it was a Selective Service trial involving a conscientious objector, the Trial Judge during the voir dire examination, excused for cause one of the jurors who had a son in the service. Then, subsequent to the trial of the cause, during post-trial motion hearings, the Judge disclosed to defendant and his counsel, for the first time, that he had a son serving in Viet Nam, and yet had not disqualified himself from presiding as the Judge in the trial.

In addition, the Petitioner contends that a compulsory Civilian Work Order, issued to compel civilian work in lieu of induction, during a time when there is no declared war or national emergency, is in violation of the Thirteenth Amendment to the United States Constitution.

## REASONS FOR GRANTING THE WRIT

**THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE SAME MATTER AS FOLLOWS:**

**(1) UNDER SELECTIVE SERVICE REGULATION 32 CFR, SECTION 1660.20(d), MUST THE LOCAL BOARD AUTHORIZE AND ISSUE A CIVILIAN WORK ORDER, OR MAY THE CLERK OR ONE MEMBER OF THE LOCAL BOARD ISSUE SUCH AN ORDER BASED UPON A SO-CALLED "IMPLIED CONDITIONAL ORDER" OF THE LOCAL BOARD?**

At the trial of this case the testimony elicited from the Clerk of the Local Board indicated that after authorization from the State Director had been received permitting the issuance of a Civilian Work Order on August 11, 1966, no meeting of the Board was held authorizing issuance by the Local Board. The Clerk also testified that even though she was not a member of the Board she personally signed the Order to Report. The only meeting which had been held by the Local Board with reference to the Civilian Work Order was on April 27, 1966 where the Board made a finding that the Registrant should be assigned to work of national importance as a hospital worker and that it would be appropriate for him to perform the work at University Hospital Medical Center. The Board did not authorize or direct the Clerk to issue such an Order under 32 CFR Section 1604.59, nor did it authorize the issuance of an

Order under Section 1660.20(d) when and if approval should be received from the National Director or State Director of Selective Service.

Thereafter, the National Director did authorize the issuance of an Order and that authorization was received by the Clerk of the Local Board on August 11, 1966. The Clerk personally issued the Order to Report the next day without any authorization from the Local Board.

Section 1660.20(d) of Selective Service Regulation 32 CFR, provides in relevant part as follows:

> "If after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree to a type of civilian work which should be performed by the registrant in lieu of induction, *the local board* with the approval of the Director of Selective Service, *shall order* the registrant to report for civilian work . . . ." (Emphasis added).

The Court of Appeals for the Ninth Circuit held in *Brede* v. *United States,* 396 F.2d 155 (9th Cir. 1968) that the local board must procure approval from the National Director of Selective Service prior to issuing such an order, and then after receiving approval from the National Director of Selective Service for an issuance of the civilian work order must meet and direct the issuance of the order, officially. This opinion was modified on rehearing on *Brede* v. *United States,* 400 F.2d 599 (9th Cir. 1968), but only to the extent that the Court said that if the local board had officially met and directed the issuance of the civilian work order, conditioned upon a subsequent approval from the National Director of Selective Service, and there were some proof that this was the universal administrative practice within the Selective Service system, that upon the issuance of approval for such a civilian work

order by the National Director, the Board need not again meet and direct the issuance of the order but that apparently it could be issued by one of the Board members at the Board's direction.

In this case the record is silent as to any administrative construction or practice in the issuance of such orders either locally as to the custom with this local board, or as to the universal administrative construction throughout the United States.

The obvious implication of the *Brede* case, *supra,* is that the local board, either prior to or after receipt of approval for a civilian work order from the National Director of Selective Service, must make a determination that certain types of civilian work are appropriate, that they are available for the registrant to perform, and that they intend specifically that such an order should be issued either before or after authorization from the National Director The *Brede* opinion is clear cut in its requirement that the plain language of 32 CFR, Section 1660.20(d) be complied with to the effect that the civilian work order be authorized by "the local board".

In this case, however, the Court of Appeals has in effect rendered its decision contrary to that of the Ninth Circuit in the *Brede* opinions, *supra,* inasmuch as in this case:

(a) There is no direction by the Local Board for the issuance of such an Order;

(b) There is no proof of administrative construction to show some universal administrative practice which would permit the Clerk to issue such an Order; and

(c) There is no evidence present that the Board issued authority to the Clerk of the Local Board.

In addition, Section 1604.59 of 32 CFR provides that official papers issued by a Local Board may be signed by the Clerk of the Local Board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the Local Board. The minutes of the Local Board held on April 27, 1966 for the discussion of a possible Civilian Work Order, nor any other evidence in the case, reflects that the Clerk was ever given such authority. Nevertheless, the Order was issued by the Clerk on her own motion in this case and with no authorization by the Local Board contrary to Section 1604.59, 32 CFR, and contrary to Section 1660.20(d) of 32 CFR, which requires that it be issued "by the Local Board".

Therefore, the clear mandatory language of the Regulation was ignored by the Local Board and their violation of the Regulation was approved by the Court below contrary to the decision of the Court of Appeals for the Ninth Circuit in *Brede* v. *United States, supra.*

Furthermore, the direct result of this deviation and ignoring of two regulatory provisions of the Selective Service Regulations, has the direct result of compelling the Local Board Registrant (Petitioner here) to undertake compulsory civilian work against his will and under the order of the Board, and if he refuses, directly results in his imprisonment as evidenced by the five-year sentence imposed here. This clearly is a denial of procedural and substantive due process of law in violation of the Fifth Amendment to the United States Constitution.

**THAT THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION AS FOLLOWS:**

**(2) IS IT A DENIAL OF DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, FOR THE TRIAL JUDGE IN A SELECTIVE SERVICE CASE INVOLVING A CONSCIENTIOUS OBJECTOR, TO EXCUSE FOR CAUSE A JUROR WITH A SON SERVING IN VIET NAM AND THEN FAIL TO ADVISE DEFENDANT OR HIS COUNSEL UNTIL AFTER THE TRIAL AND FINDING OF GUILT, THAT THE TRIAL JUDGE ALSO HAD A SON SERVING IN VIET NAM?**

The Record of Proceedings illustrates in this case that at the commencement of the jury trial and during the voir dire examination certain questions were asked by the Trial Judge at the request of attorney for Mr. Hilgeneck. One of the questions which was requested to be given, inasmuch as the case was a Selective Service case involving an alleged violation by a conscientious objector, was a determination as to whether or not any of the jurors had immediate members of their families serving in the Armed Forces. The Trial Judge refused to ask the question.

Later, in response to a question which was asked relative to service on a Selective Service Board, one of the jurors, Mrs. Zelpanich, volunteered as additional information that "I have a boy in the service". The Court asked

again for a germane answer and stated to the juror that he was merely asking whether she had served on the Selective Service Board or a Draft Board and Mrs. Zelpanich again repeated, no, but she had a boy in the service.

Apparently, this concerned the Judge about the response and he relented in his previous refusal to ask the jurors about military service by themselves or members of their immediate family.

Upon opening that line of questioning, the Trial Judge did subsequently excuse *for cause* not only Mrs. Zelpanich with the son in the service, but also a Mr. Valansick, who stated that he had been in the service.

Thereafter and subsequent to the trial of the cause and the finding of guilty by the jury and in hearing on post-trial motions, the Trial Judge made the following comment:

> "The court: And has no present duties which would not permit him to work like some others have who are presently, *like my son in Viet Nam* and others." (Emphasis added.)

It is significant that this was the first time any suggestion had ever been made that the Trial Judge had a son serving in the Armed Forces in Viet Nam, and partially explains his reticence initially to propose questions to the jurors about service of immediate members of their families in the Armed Forces.

In *Knapp* v. *Kinsey*, 232 F.2d, 458 (6th Cir. 1956), the Court of Appeals held applicable criteria to determine prejudice or bias which would disqualify a judge from sitting in a judicial proceeding, to bias and prejudice appearing during the course of the proceedings, which would render a judgment therein invalid. Citing various cases the Court stated that fairness required not only the absence of actual bias in the trial of cases, but the endeavor

"to prevent even the probability of unfairness." (*Knapp, supra,* p. 467).

> "Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge." (*Knapp,* p. 467).

The probability of unfairness to the defendant in the trial of this cause thus becomes apparent from a combination of factors:

(a) The Trial Judge's initial reticence to propound questions on voir dire regarding military service of the jurors or their immediate families;

(b) His excusing for cause, those members of the jury panel who did have a son in the Armed Forces, or prior military service personally;

(c) The Judge's seeming willingness to actively assist the United States Attorney in presenting evidence most favorable to the Government's position (P. 25A, and pages immediately preceding in the Trial Transcript);

(d) The Trial Judge's refusal to charge the jury on a basic theory of the defense upon which evidence had been presented (page 67A in Appendix to Petitioner's Brief in the United States Court of Appeals for the Sixth Circuit);

(e) The Trial Judge's admission on the Record subsequent to the trial and admittedly in an offhanded way, that the defendant could not complain of pressing duties such as the Judge's own son in Viet Nam; and

(f) The voluntary statement made by two of the three Judges of the Court of Appeals in its decision of November 7, 1969, wherein they stated that "the sentence of five years imprisonment would seem to be to us to be rather severe."

The probability of such unfairness is particularly significant when viewed against the Judge excusing for cause a member of the jury panel who had a son merely serving in the "Armed Forces". If that was significant as a factor as to that juror and one other who had prior military service because of possible prejudice, it would be entirely more significant as to possible prejudice of the Trial Judge whose son was serving in Viet Nam at the time of the trial. And, doesn't the five-year sentence, voluntarily called "rather severe" by the Court of Appeals, accurately reflect that pre-judgment by the Trial Judge.

The proper administration of justice not only requires the appearance of a detached impartiality, but it also requires a " . . . . judge, whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel." *Rapp* v. *Van Dusen,* 350 F.2d, 806, 812 (3rd Cir. 1965).

It is submitted that these factors individually and collectively, had the enormous effect of denying to the defendant in the Trial Court a fair trial thereby depriving him of both procedural and substantive due process of law in violation of the Fifth Amendment to the United States Constitution. The subsequent conviction and five-year sentence deprives him of life, liberty and property without such due process.

**AN IMPORTANT QUESTION OF FEDERAL LAW HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT:**

**(3) IS AN ORDER TO REPORT FOR CIVILIAN WORK IN LIEU OF INDUCTION, A VIOLATION OF THE THIRTEENTH AMENDMENT?**

The Petitioner was charged in the Indictment with becoming a Registrant at his Local Selective Service Board

and knowingly failing to report for compulsory civilian work in violation of Section 12 of the Universal Military Training and Service Act, Section 462, Title 50, Appendix United States Code.

The Thirteenth Amendment to the United States Constitution states that:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Clearly, any Order to Report for Civilian Work in the absence of a declared war or state of national emergency would be void and in violation of the Thirteenth Amendment as previously stated, in that it constitutes involuntary servitude, and is not being done as punishment for any crime.

In *Holmes* v. *United States,* 387 F.2d, 781, Cert. Denied, 391 U. S. 936 (1967), in the dissenting opinion of Justice Douglas on the denial of certiorari, he pointed out at length that the Supreme Court of the United States has never decided the question of whether a peacetime draft or involuntary conscription is authorized under the Constitution of the United States. In support of his dissenting opinion, he cited various cases showing that the power to draft, when upheld by the Courts, had always been executed at the time when the nation was at war. (Citing *Billings* v. *Truesdell,* 321 U.S. 542; *United States* v. *MacIntosh,* 283 U.S. 605, and *United States* v. *Nugent,* 346 U.S. 1)

It was pointed out that the power to conscript was clearly a part of the war power and therefore, it follows that any Order to Report for *Civilian Work,* in the absence of a declared war or state of national emergency, would

be void and in violation of the Thirteenth Amendment, in that it constitutes "involuntary servitude" and is not being done as punishment for any crime.

The obvious intent of the framers of the Constitution, in view of the Thirteenth Amendment, coupled with the Fifth Amendment provision that no person shall be " . . . . deprived of his life, liberty or property, without due process of law" is that the liberty, privacy and integrity of the citizen would be inviolate, and not subject to disturbance by the Government, with the possible overriding exception of the necessity of compulsory military conscription in times when a declared war or overriding public emergency and public considerations have been recognized by the Congress as taking precedence.

However, the Congress, having granted an exemption from compulsory military conscription to those who are labeled "Conscientious Objectors", has exceeded the constitutional power granted to it by the United States Constitution as limited by the Thirteenth Amendment, in that, having been recognized as an exempt "conscientious objector" he should then be recognized as having the same right of liberty and privacy and to be free of involuntary servitude the same as any other citizen of the United States.

Implicit within the foregoing reasons for the Court assuming jurisdiction, is the contention of the Appellant that, requiring a *conscientious objector,* who has been found entitled to an exemption from compulsory military service, to perform compulsory *civilian work,* results in the creation of an arbitrary and discriminatory classification by requiring civilian work to be performed by conscientious objectors *only.* Other categories of persons who are eligible for the draft, but exempted for various reasons, have nevertheless *not* been required to perform civilian work in

lieu of induction. For example, the general principles of classification are stated in Selective Service Regulations, 1622.1 and 1622.2. Under the various classes are such categories as "I-S: Student Deferred by Statute", "I-Y: Registrant qualified for military service only in time of war or national emergency", "II-S: Registrant deferred because of activity in study", "III-A: Registrant with a child or children; and Registrant deferred by reason of extreme hardship to dependents", "IV-A: Registrant who has had completed service; sole surviving son", "IV-F: Registrant not qualified for any military service", and finally "V-A: Registrant over the age of liability for military service".

In observing these various categories of persons exempt from compulsory military service, only in the case of the physical disability or mental disability of a person classified IV-F, is there a question raised of physical or mental inability to perform civilian service in lieu of induction. All of the other categories, found to be exempt or unavailable for military service, do not require the performance of civilian service in lieu of induction. Certainly the exemption of persons in those classes from military service, without a corresponding obligation for civilian service in lieu of induction, grants to persons so classified an arbitrary and superior right to that of a person classified as a "Conscientious Objector" who has likewise been found entitled to an exemption but who has then arbitrarily been required to perform civilian services in the nature of involuntary servitude. This arbitrary classification, by discriminating in the manner described, has deprived a person in the classification of "Conscientious Objector" of the equal protection of the law and has deprived them of their life, liberty and property without due process of law in violation of the Fifth Amendment of the United States Constitution.

It is clear from a review of the foregoing, in view of the clear language of the Thirteenth Amendment to the United States Constitution that the circumstances are:

(a) The Work Order issued to JAMES LEE HILGENECK imposed involuntary servitude;

(b) Was not as a punishment for crime;

(c) There was no declared war or state of national emergency; and

(d) The direct result of the refusal to comply was, as evidenced here, a sentence to five years imprisonment in the Federal Penitentiary.

Under what circumstances could there possibly be a more clear cut violation of the Thirteenth and Fifth Amendments?

## CONCLUSION

This case, thus, presents these three important Federal constitutional questions in a clearly justiciable setting. It is respectfully submitted that this Court should issue its Writ of Certiorari in order that it may consider and decide these questions, and it is prayed that this Court will issue its Writ of Certiorari to the Court of Appeals for the Sixth Circuit to review its Judgment.

Respectfully submitted,

KENNETH S. JACOBS
JACOBS & SPENCER
207 South Villa Avenue
Villa Park, Illinois 60181
312—833-1510